

REMARKS

Claims 1-20 are all the claims pending in the application. Applicants have amended the specification to the first paragraph of the specification to reflect that the parent application is now a U.S. patent.

Entry of the above amendment is respectfully requested.

Initially, the Examiner is respectfully requested to acknowledge Applicants' claim to domestic priority to provisional application no. 60/232,433 and confirm receipt of the verified English translation of the provisional application which was filed on February 23, 2001, in the provisional application. A copy of Applicants filing receipt is attached hereto.

On page 2 of the Office Action, claims 1-20 are rejected under 35 U.S.C. § 101 as claiming the same invention as that of claims 1-11 of prior U.S. Patent 6,643,120.

Applicants respectfully submit that a double patenting rejection under 35 U.S.C. § 101 is improper.

Initially, it is noted that U.S. Patent 6,643,120 is the patent issuing from the parent application of this case. The claims of the present application and the claims of U.S. Patent 6,643,120 are not identical. The claims of U.S. Patent 6,643,120 have an additional limitation further limiting the niobium powder.

A test for double patenting under 35 U.S.C. § 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. *See*

MPEP 804. In this case, for example, if the niobium powder does not contain niobium nitride, niobium carbide, niobium boride and niobium sulfide, then the claims of U.S. Patent 6,643,120 would not be literally infringed, but the claims of the application still could be. Thus, a claim in this application could be literally infringed without literally infringing a claim in U.S. Patent 6,643,120, and the claims of the present application should not be rejected under 35 U.S.C. § 101.

In view of the above, withdrawal of the rejection under 35 U.S.C. § 101 is respectfully requested.

In addition, although the Examiner has not issued a non-statutory double patenting rejection, Applicants submit herewith a terminal disclaimer disclaiming the terminal part of any patent granted on the above-captioned U.S. Application No. 10/600,358 which would extend beyond the expiration of the full statutory term as presently shortened by any terminal disclaimer of U.S. Patent 6,643,120.

The filing of the terminal disclaimer is not an admission of the propriety of a non-statutory obviousness-type double-patenting rejection.

In conclusion, the §101 rejection should be overcome, and in view of the above, it is respectfully submitted that the claims are in condition for allowance.

Reconsideration and withdrawal of the rejection, and the allowance of claims 1-20 at an early date are respectfully requested.

RESPONSE UNDER 37 C.F.R. § 1.111
U.S. Application No. 10/600,358

Attorney Docket Q75941

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,



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